(3)

No. 04-33

In the Supreme Court of the United States

LARRY FLYNT AND L.F.P., INC., PETITIONERS

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Defense Department Directive No. 5122.5 (2000) is consistent with the First Amendment.

2. Whether the district court correctly resolved petitioners' claims without allowing discovery.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 355 F.3d 697. The opinion of the district court (Pet. App. 20a-47a) is reported at 245 F. Supp. 2d 94.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 2004. A petition for rehearing was denied on April 7, 2004 (Pet. App. 50a). The petition for a writ of certiorari was filed on July 6, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Department of Defense (DoD) Directive No. 5122.5 (2000) assigns the Assistant Secretary of Defense for Public Affairs the responsibility of ensuring "a free flow of news and information to the news media, the general public, the internal audiences of the Department of Defense, and the other applicable fora, limited only by national security constraints as authorized by Executive Order 12958 * * * and valid statutory mandates or exemptions." Gov't C.A. Br. Add. 2a (para. 3.2). The Directive includes three enclosures. Enclosure 1 includes a list of other DoD Instructions and Directives that are referenced in Directive No. 5122.5. *Id.* at 7a. Enclosure 2 lists five "principles of information" that apply in carrying out DoD's policy "to make available timely and accurate information so that the public, the Congress, and the news media may assess and understand the facts about national security and defense strategy." *Id.* at 8a.

Enclosure 3, at issue here, is entitled "Statement of DoD Principles for News Media." Pet. App. 52a. Enclosure 3 provides that "[o]pen and independent reporting shall be the principal means of coverage of U.S. military operations." *Ibid.* (para. E3.1.1). In some circumstances, however, mission security and logistical concerns may limit or preclude media participation. For example, media pools, in which a limited number of journalists accompany United States troops and agree to share their work with other news organizations, "sometimes may provide the only means of early access to a military operation." *Ibid.* (para. E3.1.2). "Even under conditions of open coverage, pools may be applicable for specific events, such as those at extremely

remote locations or where space is limited." *Ibid.* (para. E3.1.3).

Enclosure 3 also provides that "[j]ournalists in a combat zone shall be credentialed by the U.S. military and shall be required to abide by a clear set of military security ground rules that protect U.S. Armed Forces and their operations." Pet. App. 52a (para. E3.1.4). The Enclosure also provides that "[j]ournalists shall be provided access to all major military units," but recognizes that "[s]pecial operations restrictions may limit access in some cases." *Ibid.* (para. E3.1.5).

DoD Directive No. 5122.5 includes several other provisions that balance the need for security with the media's desire for information. Thus, Enclosure 2 states that "[i]nformation will not be classified or otherwise withheld to protect the Government from criticism or embarrassment." Gov't C.A. Br. Add. 8a (para. E2.1.3). And Enclosure 3 instructs that military public affairs officers "should act as liaisons, but should not interfere with the reporting process." Pet. App. 53a (para. E3.1.6). It further provides that "[u]nder conditions of open coverage, field commanders should be instructed to permit journalists to ride on military vehicles and aircraft when possible." *Ibid.* (para. E3.1.7).

2. On October 30, 2001, petitioners requested that *Hustler* magazine correspondents "be permitted to accompany ground troops on combat missions and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries where hostilities may be occurring as part of Operation Enduring Freedom." Pet. App. 131a. Petitioners later renewed that request. *Id.* at 133a-134a.

In response, Assistant Secretary of Defense for Public Affairs Victoria Clarke informed Mr. Flynt that

the only United States troops on the ground in Afghanistan at that time were "small numbers of servicemen involved in special operations activity" and that "[t]he highly dangerous and unique nature of their work [made] it very difficult" to provide direct media access to those troops. Pet. App. 136a. Assistant Secretary Clarke explained that DoD already had "facilitated extensive access to military operations thus far in the war on terrorism. Scores of reporters and photographers have covered the strikes, witnessed the humanitarian drops and interviewed dozens of men and women serving in the region." *Ibid.* She provided the name and telephone number of the 5th Fleet Public Affairs Officer who was handling media requests at that time and invited Mr. Flynt to have his reporters call if they were interested in obtaining similar access. *Ibid.*

Because petitioners "were not interested in and had not requested access to the types of press coverage offered by Assistant Secretary Clarke, [petitioners] did not contact the 5th Fleet Public Affairs Officer." Pet. App. 112a (para. 73). Instead, the day after receiving the Assistant Secretary's letter, they filed the present suit. See *id.* at 58a (Docket Entry 1).

In January 2002, petitioners renewed their "request for permission to have a reporter employed by [petitioners] accompany ground troops in order to cover actual combat activity carried out in connection with the current military campaign known as Operation Enduring Freedom." Pet. App. 146a-147a. Assistant Secretary Clarke invited petitioners to work with the military's public affairs officers to arrange for access to United States troops. *Id.* at 150a. Because the military had increased its ground presence in Afghanistan since petitioners' earlier correspondence in the fall of 2001, Assistant Secretary Clarke was able to provide Mr.

Flynt with a list of public affairs officers who were on the ground in Afghanistan. Accordingly, petitioners were provided the names, telephone numbers, and e-mail addresses of several officers to contact, depending on which military unit they would like to visit. *Id.* at 152a-154a.

Petitioners' counsel sent an e-mail message to one of the persons on that list, Lt. Col. Bonnie Hebert, requesting "permission to have a Hustler magazine correspondent embed with American land forces in Afghanistan for the purposes of accompanying them on their missions and reporting news of their activities, particularly in combat situations, subject to reasonable regulations intended to protect the safety and security of those involved in those operations, as well as the secrecy and confidentiality of information which, if disseminated, could endanger United States soldiers or our allies or compromise military operations." Pet. App. 155a. Lt. Col. Hebert informed petitioners' counsel that "[w]e are working on your request" and asked for further details regarding where petitioners would like to go, whom they wanted to send, "and when and what type of operations they want[ed] to cover and for how long." *Id.* at 159a. Sergeant Aaron Lawrence later e-mailed petitioners' counsel setting forth details about locations in Afghanistan where a reporter could cover operations, including the best place "to actually stay with combat soldiers in the Afghan theatre." *Id.* at 161a.

On March 8, 2002, David Buchbinder, a correspondent reporting on activities in Afghanistan for *Hustler*, e-mailed Sergeant Lawrence, explaining that his "primary objective" was "to physically stay with soldiers at their bases, and to accompany them on combat missions." Pet. App. 165a. Mr. Buchbinder also requested

"a list of military media liaisons on the ground in Afghanistan, and their contact numbers." *Id.* at 166a. Respondents subsequently provided that contact information. *Id.* at 168a.

Mr. Buchbinder arrived at Bagram Air Base on March 18, 2002, and stayed two nights, covering various events and interviewing soldiers. Pet. App. 178a (para. 4). He returned on April 6, 2002, and conducted additional interviews. *Ibid.* On May 7, 2002, Mr. Buchbinder filed an affidavit stating that he was at Bagram Air Base and had been placed on the requisite waiting list for journalists seeking access to combat missions. *Id.* at 181a (para. 12). Mr. Buchbinder also stated that he had made a request to the appropriate authority to accompany special forces operations and had been informed that officials at Bagram Air Base were awaiting approval from officials in the United States to allow reporters to accompany special forces on missions. *Id.* at 182-183 (paras. 24, 35). At the time of his affidavit, Mr. Buchbinder had not accompanied soldiers on any missions. *Id.* at 185a (para. 46). But he had been informed that his position on the waiting list was rising, *id.* at 184a (para. 43), and that the military "was lobbying with British forces to have [him] placed on one of their missions," *ibid.* (para. 45).

David Buchbinder ultimately published various articles recounting his experiences in Afghanistan, including two articles in *Hustler*. See David Buchbinder, *Grunt Work: Army Troops Mop up a Special Forces War*, Hustler, Jan. 2003, at 90; David Buchbinder, *We Came, We Saw, We Pulled Guard*, Hustler, Oct. 2002, at 94; David Buchbinder, *A Soldier's Life in Afghanistan*, Christian Science Monitor, Feb. 27, 2003, at 11; David Buchbinder, *Response to Terror a Military That Lacks One Crucial Element: Weapons*, Los Angeles

Times, Oct. 6, 2002, at A36. The articles in *Hustler* provide what purport to be first-hand accounts of (1) a patrol mission that proceeded via armed convoy from Bagram Air Base, and (2) an operation involving a battalion of nearly 400 soldiers searching for a senior al Qaeda operative and fighters under his command. See Gov't C.A. Br. Add. 17a, 20a-24a.

3. Petitioners filed their original complaint on November 16, 2001, and moved for a preliminary injunction ten days later. Pet. App. 58a. The district court denied the preliminary injunction motion. *Id.* at 137a-142a. Petitioners filed an amended complaint raising both as-applied and facial challenges to Enclosure 3 of Directive No. 5122.5. See *id.* at 6a-7a, 99a-129a. The government moved to dismiss the amended complaint, and the district court granted that motion. *Id.* at 20a-47a.

The district court held that petitioners' as-applied challenges were not ripe, and that petitioners lacked standing, because "defendants have not made a final decision with respect to [petitioners'] request for access to combat ground forces in battle." Pet. App. 29a. The court noted that, at the time the complaint was filed, DoD was working to provide petitioners' reporter with access to United States ground troops.

The district court held that petitioners' facial challenges were justiciable. Pet. App. 34a-41a. But the court declined to exercise its discretion to resolve those claims for declaratory and injunctive relief. The court determined that "the more prudent course is to delay resolution of these constitutional issues until and unless [petitioners] are denied access after having pursued their request through normal military channels." *Id.* at 46a.

4. The court of appeals affirmed. Pet. App. 1a-17a. The court held that petitioners had standing and that their claims were ripe for judicial review. *Id.* at 9a-10a. The court then rejected petitioners' claims on the merits.

The court stated that petitioners' facial challenge "is premised on the assertion that there is a First Amendment right for legitimate press representatives to travel with the military, and to be accommodated and otherwise facilitated by the military in their reporting efforts during combat, subject only to reasonable security and safety restrictions." Pet. App. 10a. The court held that "[t]here is nothing we have found in the Constitution, American history, or our case law to support" petitioners' facial challenge to Directive No. 5122.5. *Ibid.*

The court also rejected petitioners' as-applied challenges. The court explained that "[a]t no time has Flynt ever claimed that he, or *Hustler*, was treated differently under the Directive than any other media outlet. Nor has he claimed that the Directive is some sort of sham that was not followed." Pet. App. 15a. The court noted that, in initially denying petitioners' reporter access to ground troops, "in conformity with the letter and spirit of the Directive, [Assistant Secretary of Defense] Clarke not only explained why direct access to ground troops was not currently possible, but she also immediately gave Flynt the information necessary to receive the access that was available." *Id.* at 16a. The court explained that "[i]t was Flynt who failed initially to contact the designated public affairs office. Ultimately, Flynt's reporter was given broad access to troops and has filed several stories, at least one of which shows he has accompanied troops on a search for al Quaeda operatives." *Ibid.*

DISCUSSION

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. Petitioners (Pet. 11) ask this Court to determine "the extent to which, if at all, the First Amendment affords the press a right of access to combat zones controlled by the U.S. military." As the court of appeals explained (Pet. App. 8a), however, "[t]he Government has no rule—at least so far as Flynt has made known to us—that prohibits the media from generally covering war. Although it would be dangerous, a media outlet could presumably purchase a vehicle, equip it with the necessary technical equipment, take it to a region in conflict, and cover events there. Such action would not violate Enclosure 3 or any other identified DOD rule." Accordingly, as petitioners acknowledge (Pet. 11 n.1), the courts below did not resolve whether the First Amendment guarantees the press a right to obtain access to overseas combat zones without the assistance of the military. There is similarly no reason for this Court to address that issue for the first time in this litigation. Because petitioners have not shown that the government has prevented them from independently traveling to combat areas in Afghanistan, the question whether such a restriction would be consistent with the First Amendment is not presented here.

As the court of appeals explained (Pet. App. 8a), "it is not at all clear from [petitioners'] complaint below or briefs in this court precisely what right they believe was violated or contend the courts should vindicate." Petitioners state (Pet. 12) that they "did not, and do not, contend that the military is under any obligation,

constitutional or otherwise, to furnish accommodations or other support to journalists in the combat zone." To the extent that petitioners nonetheless claim that the government has a First Amendment obligation to provide them with access to combat zones, petitioners have not established the factual predicate for such a claim. As the court of appeals recognized, petitioners' reporter "was given broad access to troops and has filed several stories, at least one of which shows he has accompanied troops on a search for al Quaeda operatives." Pet. App. 16a.

In any event, the court of appeals correctly held that the First Amendment does not require the military to furnish petitioners with access to overseas combat zones. This Court repeatedly has distinguished between government actions that interfere with protected expression and those that merely deny access to government information or property that is not open to the public. In general, actions that merely deny access to government property or information that is not open to the public do not implicate the First Amendment. See, *e.g.*, *Los Angeles Police Dep't* v. *United Reporting Publ'g Co.*, 528 U.S. 32, 40 (1999); *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion); *id.* at 16 (Stewart, J., concurring in the judgment); *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 850 (1974); *Pell* v. *Procunier*, 417 U.S. 817, 834-835 (1974).

The Court has recognized one limited exception to that general rule. In *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), the Court held that the First Amendment implicitly incorporates a public right of access to criminal trials. See *id.* at 564-571. The Court noted that there had been a 1000-year "unbroken, uncontradicted history" of public access to criminal trials in Anglo-American law, running from

"before the Norman Conquest" to the present. *Id.* at 573; see *id.* at 565-573. The Court reasoned that this tradition was reflected in the Sixth Amendment guarantee of a "public trial" to criminal defendants, *id.* at 574, that the First Amendment "was enacted against the backdrop of the long history" of public criminal trials, *id.* at 575, and that public access "inheres in the very nature of a criminal trial under our system of justice," *id.* at 573.

Unlike access to criminal trials, there has not been a 1000-year "unbroken, uncontradicted history" of public access to foreign combat zones. The history of access that petitioners reference (Pet. 20-22) is, by their own account, neither "unbroken" nor "uncontradicted." Moreover, this Court "over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensable." *Greer* v. *Spock*, 424 U.S. 828, 837 (1976). That special function has overriding significance in foreign combat zones and precludes recognition of a First Amendment right of the press to accompany ground troops into overseas combat.

2. Petitioners further contend (Pet. 23-24) that they should have been permitted to conduct discovery. But the court of appeals correctly determined that petitioners' claims fail as a matter of law. And, in any event, the fact-bound question whether petitioners should have been allowed discovery does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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